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In the Supreme Court of the United States

OCTOBER TERM, 1957

MORITZ BROKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A 1b–4b) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 16, 1957. The petition for a writ of certiorari was filed August 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether in the circumstances of this case the District Court abused its discretion in denying petitioner's motion, on the eve of trial, to take the deposition

of a co-defendant in Germany by written interrogatories.[1]

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on all counts of a three count indictment charging (1) importation of watch movements by means of a false statement; (2) receiving, concealing, and facilitating the transportation of the watch movements knowing them to have been brought into the country contrary to law; and (3) conspiracy to smuggle into the United States watch movements and cameras. (R. I, 8–11). He was given concurrent sentences of two years on the first count and five years on the other two (R. I, 99).

1. The evidence for the Government may be summarized as follows:

Under customs regulations, goods landing in the United States merely for the purpose of transhipment to another country may be admitted without inspection and without payment of import duty—a method known as importation in bond. Goods may also be held in the Foreign Trade Zone pending arrangements for transhipment. The goods may be carried from the point of landing, or from the Foreign Trade Zone, to the point of transhipment by licensed carriers who are allowed, when necessary, to hold the shipment overnight (R. II, 131–136). Firms known as customs' brokers arrange for the admission or forwarding of freight through customs (R. II, 6).

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[1] Petitioner also raises a question of the sufficiency of the indictment on one count, but this question is not really in the case because of concurrent sentences imposed. See footnote 4, *infra*, p. 9.

In May 1954, petitioner asked Wegner, traffic manager of Alltransport, a customs' broker, whether Wegner knew a trucker who could help petitioner in bringing in and exchanging merchandise (R. II, 6–9). Wegner spoke to Pat Maisiello of P. M. Transfer Company, Inc., the concern which handled bonded deliveries for Alltransport (R. II, 8–9). At a meeting of Wegner, the two Maisiellos, and petitioner, arrangements were made whereby the Maisiellos would receive $350 for each case of merchandise smuggled in (R. II, 15–16, 148–152, 163, 167–169).

The method of operation was for Wegner's firm, Alltransport, to act as forwarders to Canada of shipments supposed to contain clocks. Wegner, as traffic manager, would direct P. M. Transfer Company to do the trucking. The Maisiellos would remove the actual contents (cameras and watch movements), fill the packages with clocks supplied by petitioner, and then deliver the packages for transhipment (R. II, 19–21, 48–52, 62, 70–72, 83–84, 89–91, 98–102, 103–104). About eight to ten shipments were thus handled from May 1944, to December 1955 (R. II, 162–163).[2]

Petitioner told an old friend in Canada that he could help the friend out by giving him clocks at cost price (R. II, 173–176). The friend, who operated a tile business, picked up one shipment after petitioner

[2] The second shipment in 1954 supposed to contain clocks was discovered to contain cameras. Petitioner told Wegner not to worry, that he and a Mr. Brukirer in Munich, Germany, had a friend in customs who knew about shipments. The boxes were returned on orders from Germany (R. II, 40–46).

paid the charges. He failed to claim a second shipment (R. II, 56–58, 177–179).

The Maisiellos complained to petitioner, directly or through Wegner, that matters were not being handled well. There were various difficulties—that the boxes sent were too small for the clocks they presumably contained; that weights were not the same; and that the shipments were not being picked up in Canada (R. II, 37, 70, 73, 81–82, 86). Petitioner, on the other hand, complained of pilfering (R. II, 83, 91–97). In the fall of 1955, petitioner said that he had thought of a new method which would make unnecessary the opening of cases, that it would involve only a complete switch of boxes (R. II, 97, 162).

Four cases of tripods consigned to Semrhib Trading Corporation (a name under which petitioner operated (R. II, 110–111)), arrived in December 1955. They were put in the Foreign Trade Zone where merchandise in transit may be held without inspection (R. II, 76–77, 196). In January 1956, petitioner told Wegner that two cases would arrive from Germany consigned to Alltransport and that the firm would receive "direct instructions from S. Brukirer" to forward them to Canada (R. II, 112). At that time, the tripod cases then in the Foreign Trade Zone were to be withdrawn and Wegner was to tell the Maisiellos to have the withdrawn tripods and the two new cases in their place of business simultaneously. All that would be necessary was to switch an extra board on top (R. II, 112–115).

In December 1955, a German customs agent in Bremen seized two cases containing watch movements

when two other packages, said to contain tripods, were found to be empty (R. I, 59, 65). Brukirer came to the agent from Munich in an effort to get the watches released. Brukirer denied that the watches were to be smuggled into Germany. When told the watches would not be released unless a credible explanation was made, Brukirer asked whether the agent was under any obligation to inform the American customs officials. After the agent said he had no such obligation, Brukirer said that the watches were to be smuggled into the United States; that Mr. Semrhib had given him instructions. The agent agreed to release the watch movements if they were shipped to the United States. Brukirer said he could do this only if they were invoiced as tripods (R. I, 57–70). They were allowed to be so invoiced and were admitted to this country as tripods in bond for shipment to Canada (R. II, 141–145).

In New York, three of the cases actually containing tripods, which were being held in the Foreign Trade Zone, were taken out as import and duty paid thereon. They were taken by P. M. Transfer Company. Pat Maisiello then picked up the two cases allegedly containing tripods for transhipment, but actually containing the watch movements, on January 27, 1956. Agents followed him, seized the cases, and found the watch movements (R. II, 142–146). (The customs duty on the 4,488 watch movements found would have amounted to $13,130.10).

S. Brukirer had sent a letter to Alltransport, dated January 9, 1956, asking them to ship two cases of tripods to Canada (R. II, 120–121). After the seizure

of January 27th, Alltransport, on January 30, and 31, and again on February 13, 1956, received telegrams and letters from S. Brukirer in Munich telling it to redeclare the cases as watches and send them by airplane to Geneva. The February communications stated that the Semrhib Trading Company had nothing to do with the watches (R. II, 122–126).

2. Petitioner was arrested on April 18, 1956 and arraigned on April 19. In the middle of June, trial was set for July 23. About the middle of May, the Assistant United States Attorney, in a conversation with petitioner's attorney, told him that the German customs agent would be used by the Government to testify to his conversation with S. Brukirer at the time when the latter was endeavoring to get the watches released from the German customs. S. Brukirer was named as a co-defendant in the indictment.

On July 13, petitioner filed an application, returnable July 23, for leave to take the testimony of S. Brukirer in Germany on written interrogatories (R. I, 12–13). This was supported by petitioner's affidavit to the effect that the Government intended to call the German customs agent, that Brukirer was beyond the reach of the District Court, that petitioner lacked the financial means to arrange for an oral deposition, and that it was believed the interrogatories of S. Brukirer would serve to impeach or contradict the customs agent (R. I, 14–15). In opposition, the United States pointed out that there was no affidavit of S. Brukirer accompanying the motion (R. I, 16–17). Petitioner's attorney then filed a reply

affidavit to the effect that he, as attorney, had only recently learned that efforts to have S. Brukirer appear at the trial as a witness were unsuccessful. He also said that defense "sources", which were unnamed, had developed that—subsequent to the conversation to which the Government witness (the German customs agent) would testify—S. Brukirer, when questioned by German customs officials, had denied that petitioner was connected with the shipment and that S. Brukirer had said he would so swear. The attorney alleged that, as the result of this information, he was "morally certain" that Brukirer would submit to written interrogatories, particularly since the attorney assumed that the German government would "assist in the execution of the commission by applying necessary legal pressure on Brukirer" (R. I, 18–19).

At the argument on the motion, petitioner's attorney stated that this information that Brukirer had changed his story was not obtained from Brukirer (R. I, 25). When the judge asked why no attempt had been made to get an affidavit from the person who heard Brukirer so state, the attorney asked for permission to send a cablegram to Brukirer asking him whether he would sign interrogatories (R. I, 25). Government counsel stated that information from the German customs officials did not show that Brukirer had changed his story to them (R. I, 26). The District Court denied the motion as not timely filed and without sufficient predicate, stating that, in the interest of justice, the court was open to consider anything new that might arise (R. I, 32–33).

On July 26, petitioner renewed his motion, stating that a cable had been sent to S. Brukirer asking, with respect to the two cases involved, "Will you answer, sign, swear before American Consul question on this subject sent out through United States Court," to which the reply had been "Yes" (R. I, 34). The Government counsel pointed out that the fact that petitioner, in two days time, could get in touch with the co-defendant tended to emphasize the untimeliness of the motion, and also that petitioner's attorney had never specified the source of his information as to Brukirer's possible testimony. He also mentioned, in connection with the claim that petitioner was financially unable to take oral depositions, that Mr. Katzen, an attorney, had come to the United States Attorney's office the day after the preceding argument, asking about the possibility of adjournment. Mr. Katzen had said that petitioner had come to his office and offered him a fee as substituted attorney (R. I, 38–39). Petitioner's attorney stated that, some time before, petitioner had asked if he would mind if another attorney were to assist him, and he had expressed willingness; that the day before the motion under consideration, petitioner had told him that he had asked Mr. Katzen if Katzen could help, but that there was no thought of substitution (R. I, 40–41). The court then said, "That puts a different color on the whole case. I was about to grant your motion" (R. I, 39). And further (R. I, 41): "The District Attorney will make an affidavit outlining the statement made in

court today. The motion is denied. Your client, Mr. Broker, is trifling with the Court."[3]

ARGUMENT

The only question is whether, in the circumstances of this case, the District Court abused its discretion in denying petitioner's motion for leave to take the interrogatories of S. Brukirer in Germany.[4] The con-

[3] Government counsel's affidavit stated that Mr. Katzen told him that petitioner had said he wanted to retain Katzen in the case and Katzen had said he would be unable to take the retainer unless he could obtain an adjournment. Katzen asked whether adjournment would be possible on the ground that new counsel had come into the case, but was told that none would be granted. Petitioner's attorney filed an affidavit saying that Katzen had told him that, when Broker consulted Katzen, he (Katzen) said he would take no case which would interfere with his vacation plans. For that reason he had asked about the possibilities of adjournment. A fee was not discussed although Mr. Katzen had assumed that if he accepted the case there would be a fee. Petitioner's affidavit was that Mr. Katzen had said he would not take the case unless it were adjourned and that a fee had not been discussed (R. I, 42–47).

[4] Petitioner attacks the sufficiency of the indictment under count II on the ground that it fails to specify with sufficient particularity the facts showing that the watch movements had been imported "contrary to law." In view of the fact that the conspiracy count, which was fully sustained, supports the sentence, the other question is not in the case. *Pinkerton* v. *United States*, 328 U. S. 640. In any event, the indictment in this case is distinguishable from that in *Keck* v. *United States*, 172 U. S. 434, and more recent Court of Appeals cases following it, to the effect that an allegation that merchandise has been imported "contrary to law" is too indefinite to inform the accused of the offense with which he was charged. Here, the indictment did set forth that the merchandise had been introduced in violation of specific statutes: 18 U. S. C. 542, proscribing importation by

clusion of the Court of Appeals that there was no abuse of discretion is amply supported by the record. In fact, considered against the whole of the evidence as it developed at the trial, the motion appears to have been even more insubstantial than the trial judge thought when he ruled on the motion. The lack of any reasonable explanation for the delay and the careful lack of candor displayed in the affidavits on the motions fully justified the denial. See *Heflin* v. *United States*, 223 F. 2d 371 (C. A. 5).

In his first, generalized, affidavit, petitioner stated that it was believed that the interrogatories would "either serve to impeach testimony of the German Customs agent or contradict the said testimony" (R. I, 15). Nowhere, in the attempt to meet the requirement of specificity, was it ever suggested that Brukirer would deny the statements the agent testified he had made in trying to get the watch movements released. Nowhere was there any attempt to specify the source of the alleged new version of the transactions said to be given by Brukirer. Even in the final hour, when Brukirer suddenly became available by cable, there was no statement as to what his actual testimony would be.

The explanation of the delay in making the application is also unconvincing. It would hardly take from May to July to learn that a person, domiciled in Ger-

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a false statement; 19 U. S. C. 1484, requiring an entry at customs by the consignee of imported merchandise; and 19 U. S. C. 1485, requiring a true declaration in the invoice. Particularly in view of the modern tendency to depart from the strict rules of pleading in effect when *Keck* was decided (see *United States* v. *Debrow*, 346 U. S. 374), this indictment was sufficient.

many, who was named as a co-defendant in a United States indictment, would not be available as a witness at the trial. And the ease with which Brukirer was reached after the court denied the motion on July 23, so that the motion could still be renewed on July 26 before trial, suggests that more communication was possible than the moving papers disclosed. This is particularly so since the evidence at the trial showed S. Brukirer to be admittedly a relative (Tr. 818–819), if not in fact the brother, of petitioner.[5]

Moreover, the evidence at the trial points up the insignificance of the most favorable testimony which petitioner claimed that Brukirer could give. The testimony of the German customs agent as to Brukirer's statements to him were admissible because they were made in furtherance of the conspiracy, in order to get the watch movements out of the German customs and into the United States (see R. I, 57). Subsequent retractions, after the property had been discovered and seized and the conspiracy ended—and that is the most that petitioner claimed he could get from the interrogatories—would merely have been self-serving declarations of little value. In addition, the Government itself brought out, at the trial, the fact that, immediately after the shipment was seized on January 27th, Brukirer had sent telegrams stating that petitioner's firm (Semrhib Trading Company) had had nothing at all to do with the watch movements.

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[5] The Canadian friend from Poland knew petitioner as Moses Brukirer. Moses had a brother Shloma who, the friend had heard, had settled in Germany (R. II, 173–174, 183).

In short, the totality of the circumstances establish that there was no abuse of discretion, and no prejudice to petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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